Privilege and Liberalism in Legal Education: Teaching and Learning in a Diverse Environment

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Privilege and Liberalism in Legal Education: 
Teaching and Learning in a Diverse Environment

Stephanie M. Wildman†

The Berkeley Women's Law Journal has been a leader in the struggle taking place in the academy to make gender, race, and sexual orientation a part of the law school curriculum. This movement has been fueled primarily by students and a number of law professors, many of whom are members of the Society of American Law Teachers. These members of the legal academy recognize the relevance and importance of issues relating to race, gender, and sexual orientation, not only to our lives but also to our teaching and learning.

Good innovations have come from this effort, including new classes, casebooks, and scholarship on subjects like sex discrimination and the law, critical race theory, and gender roles and the law. An increased acceptance of these issues in some classrooms and institutions has resulted as well.

Unfortunately, the response within the legal academy to this drive to recognize issues of race, gender, and sexual orientation has not been wholly positive. The downside is marked by law professors who race and gender their classroom hypotheticals and final exams with African-American criminals, the detailed offensive language of gay and lesbian bashing, or the

† Professor of Law, USF School of Law; Visiting Professor 1994-95, Santa Clara Law School; J.D. Stanford Law School, 1973; A.B. Stanford University, 1970. Thanks to Adrienne Davis and Trina Grillo for a meaningful working relationship; Janet Lee for excellent research assistance; and many colleagues, including faculty and students at Santa Clara Law School who care deeply about teaching and are always willing to discuss pedagogy. Thanks also to the organizers and participants of the Berkeley Women's Law Journal, Tenth Anniversary Symposium, "Looking to the 21st Century: Under-represented Women and the Law," at which an earlier version of this essay was presented.

Kendall Thomas describes the concept of "race" as a verb to signify the changing meaning of race over time as it is socially constructed. Kendall Thomas, Comments at Conference on Frontiers of Legal Thought, Duke Law School (Jan. 26, 1990), cited in Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431, 443 n.52.
grisly particulars of domestic violence directed against women. Often, when students complain, the professors answer, “But these things happen. I thought you wanted me to make my class relevant. What do you want anyway?” or something along those lines. We seek more than mere inclusion of race, gender, and sexual orientation in the law school curriculum. We seek understanding as well.

I had a recent “aha experience” about how to talk about this understanding. I was involved in a teaching exercise that crossed several first-year subject areas, including torts, property, contracts, civil procedure, and criminal law. In the problem, an African-American family was racially harassed by a white neighbor over a period of months. The harassment included shots fired at the family’s home. The police were called to the home numerous times. Both neighbors were tenants and shared the same landlord, who was white. In the problem, the landlord evicted both tenants, saying that even though the white family was primarily at fault, she did not want to become involved.

One group of students, coming to discuss the problem with other faculty members, explained that they did not believe the landlord had done anything wrong. They could see that the white tenants were culpable. The students even described them as racist. But the students refused to label the landlord as racist.

What was the landlord? By calling her “not racist,” the students placed her actions beyond reproach in their own imaginations. Perhaps the students, who were all white, imagined they might have done the same thing, and they certainly did not believe that they were racists. They simply believed it was wrong that the African-American family had been harassed because of race.

I think that as a group, white people in this culture are very eager to label prejudiced behavior that we see as racist and to separate ourselves from that behavior. Society is certainly full of extreme cases of racism. White people are so eager to distance ourselves from racism and spend so much time trying to demonstrate that we are not racist, that we fail to see the systemic privileging of whiteness. This privileging ensures that extreme acts of racism, as well as the daily microaggressions, will continue to exist.

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3 Conversation with Professor Laurie Zimet, Academic Success Program Director, Santa Clara University Law School (Oct. 27, 1994), in which she used the phrase “aha experience” to describe the moment of understanding when the learner comprehends a new idea. The phrase first appeared in Laurie Zimet, The Academic Success Program at Santa Clara, The SALT Equalizer, Apr. 1994, at 9, 10.

4 Peggy C. Davis, Law as Microaggression, 98 Yale L.J. 1559 (1989). The term microaggression refers to the subtle daily encounters between African Americans and white persons in which the African American is condescended to, or “put down” by the white offender(s). Id. at 1560. The law functions as a microaggression for many African Americans as it reflects and enforces perceptions of racial bias. Id. at 1568.
I discussed the student response to the exercise with a colleague. She suggested that white students needed to have an experiential moment, identifying with the African-American family, to enable them to understand the harm inherent in racial harassment and in the landlady's complicity. Maybe if they could write down the word or pejorative phrase that would most offend the core of their being and affect their sense of identity, then they could relate to the affront of someone remaining "neutral" about racial harassment and intimidation. My colleague suggested that I have them write down the word and then plug it into the facts of the problem, having them intimidated by a neighbor with those words, and see how they would react to the landlady then evicting them.

Okay, I thought, good idea. I discussed this plan with a second colleague, also involved in teaching the exercise, who said he was not sure that white, male, heterosexual students would have anything to say about what would affect their core identity.

I then asked, "What about cheater or wimp? Religious aspersions? Surely there would be something?" I realized as I spoke that I was confronting the analogy problem about which Trina Grillo and I have written. Although there are limits to the use of analogies between oppressions, the problem remains that analogies may be our only tool to achieve empathy with and understanding about different forms of oppression.5

This second colleague replied that he was afraid that for some white, male students the most offensive thing one could do would be to call them gay. The problem with using the analogy method to teach about racial oppression is that the comparison does not work. Racial oppression is unique. Comparing oppressions may lead to a false sense of understanding. The lesson about subordination would come at the expense of implicitly validating oppression on the basis of sexual orientation.

This was my own "aha experience." Because I found myself being trapped, not for the first time, in legal liberalism. Legal liberalism teaches us that all people should be treated equally, fairly, and the same. It is the solid underpinning of the notion of the colorblind constitution Justice Clarence Thomas recently advocated.6

It appeared when I was watching Eyes on the Prize,7 and President Kennedy intoned, with great emotional force, "Race shall play no part in American society." This is our ideal, and it is attractive.

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5 Trina Grillo & Stephanie M. Wildman, Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other -isms), 1991 DUKE L.J. 397.
The reality is that if we say race plays no part, then the invisible system of white privilege will inevitably continue. In this status quo of white privilege, the African-American family who suffered harassment may now be without a place to live, while the evicted white family finds a new home easily. Even if the African-American tenants find a new home, they may be racially harassed and suffer eviction again. The system of white privilege means that the white family is not at risk in the same way.

Legal liberalism suggests that all individuals are similarly situated in society, absent disadvantaging, unfair treatment. Systemic privilege is not part of legal liberalism’s vocabulary. Seeing the privilege of whiteness or heterosexuality takes effort for those privileged; privilege is our norm.

Yet we must also strive to see the privileging of heterosexuality. There is no real risk to the heterosexual student who is called gay names. He does not face job discrimination or have to hide the identity of his family in order to be accepted by his classmates.

Legal education needs to understand what Professor Frances Ansley recently called the “power line.” At a conference organized by the Society of American Law Teachers, Professor Ansley drew a horizontal line across the blackboard and said, “This is the power line.” She then asked the audience to consider where we were each situated with respect to race, gender, sexual orientation, and other categories. Everyone immediately understood what she meant. Those above the line are privileged with respect to those below it.

Analyzing privilege is complicated by the reality that one individual may be privileged in one respect and not in another. If everyone were simply either privileged or subordinated, then the analysis of systems of privilege would be more obvious. Instead, each of us lives at the juncture of privilege and subordination. We may be privileged in some respects while being subordinated in others.

The image that I believe best describes this reality is the koosh® ball. “Imagine intersections in three dimensions, where multiple lines intersect. From the center one can see in many different directions. Every individual exists at the center of these multiple intersections, where many strands meet, similar to a koosh® ball.” The rubbery strands of the koosh® ball consist of threads of both subordination and privilege. Each

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9 Professor Frances Ansley, Address to Society of American Law Teachers (SALT) Teachers’ Conference, University of Minnesota School of Law (Sept. 22-23, 1994).
10 The koosh® ball is a child’s toy. It is composed of hundreds of rubber strands connected at the ball’s core and extending outward to form a spherical shape. The koosh® ball image emerged from work that Trina Grillo, Adrienne Davis, and I did together. My focus from that work has been on systems of privilege. See Stephanie M. Wildman with Adrienne D. Davis, Language and Silence: Making Systems of Privilege Visible, in CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., forthcoming 1995).
11 Id.
individual is composed of these aspects of identity from above and below the power line. "In some contexts we are privileged and in some subordinated, and these contexts interact. Societal efforts at categorization are dynamic in the same way as the koosh® ball is, changing, mutating, yet keeping a central mass."\(^{12}\)

For me, the question is how to bring this knowledge about systems of privilege into the classroom and make it live for students. Teaching and learning in a diverse environment requires awareness and honesty about systems of privilege.

Let me go back to the orientation week, when I tried an exercise that Professor Patricia Cain has done. In this exercise, students choose two or three words to identify themselves, words with deep meaning about who they are and that really articulate their self image.\(^{13}\) I had separated the students into smaller groups for another purpose, and I asked them to tell a designated group scribe the words that each student selected. The scribes wrote the words down, without associating them with any particular student. The scribes then read the list of words back to the large group, and so we knew all the words the students had chosen.

Perhaps not surprisingly, given that this was an orientation class on the first day of law school, the words the students chose to describe the essence of their identity were things like afraid, unprepared, and intimidated. I think that "Cherry Garcia junkie" was the most descriptive choice. The words were mostly superficial, and the students were very protective about their beings.

Professor Cain’s experience, having done this exercise in her seminar class, and also, I believe, fairly early on in the semester, was that people of color tended to use words that identified themselves as a person of color whereas, of course, white people never used white to describe themselves. Similarly, women usually used a gendered word to describe themselves. Had I done this exercise, my own word would probably be “mother.” The only gendered word in the torts orientation class was “feminist.” One brave soul did say that. There were no words identifying students’ sexual orientation, which is not surprising for gay men and lesbians who might not be out. Those who were out obviously did not feel safe to choose that identification in class at that time.

In spite of the fact that the exercise did not turn out the way it had when Professor Cain did it, I did not regard it as a failure. I used the exercise as an opportunity to talk about what Professor Cain had done, what her results had been, and to comment on the difference between our results and hers. I spoke about the way our world is raced and gendered and how assumptions are made about sexual orientation. The class was very quiet as

\(^{12}\) *Id.*

I said this. It was the kind of quiet when you can hear a pin drop. I worried that I might have committed suicide in class that day. Since no one stayed after class to talk to me, I really had no way to know.

Fortunately, as the class proceeded, it seemed fine. Since I got the positive feedback that I often get from students, I do not think I silenced the classroom. I do think on that first day of class, I raised the idea that these issues, which are usually regarded as taboo in the classroom, could be raised. That they are taboo was demonstrated by the response; nobody other than the one brave feminist felt that she could make reference to these ideas. It was my hope that a little bit of the door to discussing these issues had been opened.

Race, gender, and sexual orientation are in the room whether we make them explicit or not, but everyone pretends that they are not noticing. Part of my point here was to say let us notice, it is okay.

I would like to say something about the context in which I felt I could raise these issues. I have been a professor for twenty years, and I have tenure. Yet, I had never done this before, and as you see, I still have some second thoughts. Part of the reason I felt I could take this step was because of how good I feel about the institution where I teach. I had been attending the orientation classes with the students and listening to what other people told them about the institutional culture and I really liked what I heard. The Dean said he supported the Academic Success Program. It might seem like a small thing, but in some institutions we cannot even get the administration to pay lip service to this idea.

There are some things I did not say to the class, which upon reflection I wish I had said. First of all, regarding race, we live in a world which is raced. We wish it were not so. We have a great mythology about all people being equal. Equality is our aspiration, the goal in our culture, but the fact is that our world does not treat people of all races and ethnicities alike. Our dilemma is how do we move from a world where we know the reality is non-equal treatment to the world of our aspirations.

I am afraid one of the main steps American culture has taken toward the goal of equality is to pretend the aspiration has been achieved. The result is that race becomes a taboo subject in mixed racial groups, or at least a subject that is taboo to talk about in certain ways. For example, in my experience, it is very unusual to find white people standing around and talking about whiteness. We have not given white people the vocabulary to

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14 The Academic Success Program assists students with diverse backgrounds succeed academically. The program employs innovative teaching methods to create a learning environment where difference is acknowledged and validated as part of legal education. See generally symposium issue on Academic Support Programs: Serious (and Unheralded) Work Toward Creating Diversity, The SALT EQUALIZER, Apr. 1994, at 8.
talk about whiteness. We need to begin to develop this political discourse.\textsuperscript{15}

The world, of course, is also gendered, raising many different issues. No one is going to dispute that there are men and there are women. Probably a lot of people will not even dispute that there is unequal treatment of women and men. There is a growing body of literature acknowledging that women and men have different viewpoints. In torts we now teach about reasonable people and whether there are any or if there are just reasonable men and reasonable women.

I see sexual orientation as an aspect of gender subordination. Certainly presumptions are made about sexual orientation, most often the presumption that individuals are heterosexual. We know that is not always true. Even though students in the classroom rarely identify themselves as gay or lesbian, we know that a significant percentage of the students are gay or lesbian. What can we do to create a community where students of all sexual orientations feel comfortable in the classroom? We want all students to participate in the class as themselves.

For me the key issue is how to create a classroom environment where all our students feel safe and feel able to talk about these issues. Before I was able to figure out the answer, I did something in class that was racist. It was not intentional, and I did not even realize I had done it until after the class had ended. It happened because of my good intentions, because I was trying to bring race into the discussion.

We were talking about subjectivizing the reasonable person standard of care. It was probably the fifth day of class. A student was arguing in favor of a subjective standard, as in \textit{Ellison v. Brady},\textsuperscript{16} the sexual harassment case that asked what a reasonable woman would think.

I told the student about Professor Jerome Culp, an African-American man who has written about an incident that occurred while he was walking down the street in the 1970s with a large Afro in predominantly white Evanston, Illinois. At Professor Culp's approach, an elderly white woman literally curled up into a ball in fear of him.\textsuperscript{17} Professor Culp asks whether it would have been an assault for him to say boo to her. I asked the class, "If we subjectivize the standard, are we not taking away his right to walk


\textsuperscript{16} Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

down the street?” While it was clear that I believed he had a right to walk down the street, it was near the end of class, a few more things were said, and then the class ended. Only later did I realize that I had left unsaid that her subjective reaction, her fear of him, was not reasonable.

I began the next class by saying, “Before I review the tort content of the last class, I want to talk to you about a realization I had since we met. I do not mean to have a conversation right now. I just want to tell you what I have been thinking and let you reflect on it.

“I think that our classes have been very good. We have had some excellent discussions on hard subjects. It is important to me to create a safe space in the classroom—a space where we can all think out loud, wrestle with hard subjects, and even make mistakes. I include issues of race, gender, and sexual orientation as subjects that are hard to discuss in public space because there are taboos about these issues. I think that we might unintentionally cause members of the community to feel excluded when we discuss these subjects.

“I think I made people feel excluded during our last class when I discussed Professor Culp’s experience. My intentions were good, but I think that if he had been here, he would have been saddened. The problem is that I did not make explicit the idea that it was not reasonable for the elderly white woman to curl into a ball of fear when she saw him walk down the street.

“I discussed what I did with several colleagues. The first thought it was not a big deal. The second said I might call it insensitive. I told them both that I would call it racist. A third colleague agreed with me.

“Interestingly, the first two colleagues to whom I spoke are white and the third is not. I believe that white people and people of color see issues of race from different perspectives. Even the word racism has very different meanings to different people. I think that good people may do racist things, quite unintentionally—as I did. The question is what do we do about it.

“As I wrestled with this issue, a fourth colleague asked me a helpful question. She asked what I had done in the classroom to make it safe to talk about these issues. Classroom safety would enable the class to have this conversation so that people with different perspectives could be in the room without feeling uncomfortable and gripping the table with their knuckles in aggravation.

“This question went to the heart of my concern as a teacher. I do not know that I have done anything to make students with different perspectives comfortable in the classroom other than being who I am. I want to make the process of creating a safe classroom environment more visible. It cannot come from me alone. I cannot create it myself. I want you to think about what we are doing here, and to consider what can we do if someone says something that makes you grip the table until your knuckles hurt.
“Right now my best suggestion is to use reflection pieces as a means to begin a dialogue on difficult and important issues. Put your thoughts in writing. I can create a file in the library for the class to read. Know that I welcome other ideas about process—including your reflections on reflection pieces. Give me your thoughts in your reflection pieces. Mark at the top if they are for my eyes only or for the class. There is no deadline, and these reflections are optional. We may set aside time later to talk about this. For now, I want to study torts, because you did not come prepared for this conversation, and I think it is a conversation people should be able to opt in or out of and definitely think about first.”

The class was very subdued when I finished. No one stayed afterwards to speak to me. No one turned in a reflection piece.

I spoke with a lawyer I know about this incident. He felt I had been too personal. He said that if I wanted to talk about these issues, I should use a hypothetical, pretend it is someone else, and not let the class know it is me. He said one needs to keep the professional distance of the teacher-student relationship. I question whether we have to do that. Can we do that and still talk about these issues?

The next week two students approached me individually. Neither understood what I thought I had done that was racist. I explained it to them again. As a result of this experience, I have set very modest goals for myself. If in raising issues of diversity, I can simply get students to see that racism is not something done solely by evil people “out there,” then I have accomplished something.

Professor Adrienne Davis tells a story, that is fictional but rings true, in which a law professor calls on an African-American woman, asking her to comment on the subject as an African-American. The story addresses the teacher’s power to name the student as African-American and to ignore her gender.

Professor Davis and I discussed whether it would have been preferable for the professor to ask if any African-American students wanted to answer, thereby giving them the opportunity to self-identify and name themselves. We agreed that this approach was still not acceptable. It put African-American students on the spot, asking them to take center stage and show off their African-American knowledge as if they were in class only to enlighten the white students. This kind of attention is at great cost to them.

I believe a better pedagogic tactic is to bring scholars of color into the classroom by referring to their work. There is a growing body of literature written by colleagues of color. Professors and students should be reading this literature and validating it in the classroom. If we bring the views of

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18 Adrienne D. Davis, Toward a Post-Essentialist Methodology or a Call to Counter-Categorical Practice (Sept. 15, 1994) (unpublished manuscript, on file with the author).
scholars of color into the classroom, then students of color can express their views in critique or support without being put on the spot.

We, as teachers on the dominant side of the power line relating to race, gender, or sexual orientation, are at risk that we will exhibit our own ignorance. However, it is preferable for us to shoulder this risk rather than further burdening students on the subordinated side of the line. It still costs them when we exhibit our ignorance, but at least students of color should not be forced to the center of attention when it happens.

My own students' comments about making gender, race, and sexual orientation a part of the curriculum were illuminating. Several women students, who stayed after class one day, said that some white, male students were uncomfortable because I raised all these issues. The women were not sure what to do about this. They believed it was a learning experience for the men to participate in a classroom that they did not dominate, or feel like they owned, or experience any kind of pain in the classroom.

While I strive to make all students comfortable in the classroom, I remain especially concerned about students on the subordinated side of the power line. I remain concerned that these students who have been marginal participants in the legal profession are gripping the table in pain, as the racism, sexism, and homophobia of our world resonates through the classrooms in which they are trying to learn.

I think we should begin by evaluating what we can do to make our classrooms safe places to learn. We need to ask what we are trying to accomplish by raising issues of race, gender, and sexual orientation in the classroom. We need to consider power lines, privilege, and koosh® balls. I hope the koosh® ball will remind us about privilege and how it resonates in our classrooms, where all students are trying to learn.